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No. 97-3

In the Supreme Court of the United States

OCTOBER TERM, 1996

TOTAL MEDICAL MANAGEMENT, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion by considering and resolving a question for the first time on appeal.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-14) is reported at 104 F.3d 1314. The decision of the Court of Federal Claims granting summary judgment for petitioner (Pet. App. 15-16, 22-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1997. A petition for rehearing was denied on March 27, 1997. Pet. App. 20-21. The petition for a writ of certiorari was filed on June 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) administers a health plan for certain military dependents. To provide optimal medical care for beneficiaries, military hospitals may enter partnership agreements with civilian health care facilities. See 32 C.F.R. 199.1(p); 10 U.S.C. 1096(a). The terms of those agreements, including provision for reimbursement, are typically memorialized in memoranda of understanding (MOUs).

Prior to October 1988, the applicable CHAMPUS payment regulation provided that the allowable charge for authorized care was the lower of:

> (A) The billed charge for the service;
>
> (B) The prevailing charge level that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services in the same locality during the base period.

32 C.F.R. 199.14(h)(1)(i) (1989).

Effective October 1, 1988, Congress modified the reimbursement rules. Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, § 8019, 102 Stat. 2270-20. Under the regulation implementing the new reimbursement rules, the allowable charge must be the lowest of:

> (A) The billed charge for the service.
>
> (B) The prevailing charge level that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services in the same locality during the base period.

* * * * *

> (C) For charges from physicians and other individual professional providers, the fiscal year 1988 prevailing charges adjusted by the Medicare Economic Index (MEI), as the MEI is applied to Medicare prevailing charge levels.

32 C.F.R. 199.14(g)(1)(i) (1990).[1]

Beginning in November 1988, the Ireland Army Hospital in Fort Knox, Tennessee, and petitioner entered into a series of MOUs, all providing for reimbursement at 75 or 80 percent of the "current CHAMPUS prevailing rate." Prior to the adoption of the new payment rules, the term "current CHAMPUS prevailing rate" was equated with the "prevailing charge," that is, the 80th percentile of billed charges for similar services during a base period. 32 C.F.R. 199.14(h)(1)(i)(B) (1989). Following the addition of the MEI reimbursement limitation, payments to petitioner were calculated at 75 or 80 percent of the MEI-adjusted rate, rather than at the higher "prevailing charge" rate.

In April 1992, petitioner submitted a letter to Colonel Thomas Clements, an administrator at the Ireland Army Hospital, purporting to make out a claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, for $52,746.28, the difference between the MEI-adjusted rate and the "prevailing charge" rate. See Pet. App. 7. In response, Colonel Clements advised petitioner that he was not a contracting officer

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[1] While the new reimbursement rules went into effect with the passage of the 1989 appropriations act, the regulation implementing those rules became effective April 10, 1990. 55 Fed. Reg. 13,265 (1990).

and that the MOUs were not proper subjects of a CDA claim. *Ibid.* In December 1992, petitioner filed a complaint in the Court of Federal Claims invoking the court's jurisdiction under the CDA. After the court rejected the government's argument that the MOUs were not enforceable contracts, the parties filed cross-motions for summary judgment. The Court of Federal Claims granted petitioner's motion for summary judgment, reasoning that the language in the MOUs basing reimbursement on the "prevailing rate" required reimbursement based on the "prevailing charge." *Id.* at 23-24.

The government sought reconsideration. In its order denying the motion for reconsideration, the Court of Federal Claims rejected the government's argument that the MOUs were not enforceable contracts, and found that the MOUs were "contracts resulting from an offer, acceptance, and consideration." Pet. App. 18.

The court of appeals reversed, holding that, although the MOUs met the basic requirements for a government contract, they were void because they were "in direct conflict with CHAMPUS regulations." Pet. App. 13. Specifically, the court concluded that the regulatory scheme in effect at the time the MOUs were entered into or renewed "explicitly limited health care provider reimbursement base rates to the lowest of three possibilities: the billed charge, the prevailing charge, or the MEI limited prevailing charge." *Ibid.* The illegality of agreements, like the MOUs, that "obligate[d] CHAMPUS beyond these base rates set by regulation" was "plain." *Ibid.* Moreover, since the new regulatory reimbursement scheme was in effect when the MOUs were entered into, petitioner "was on constructive

and actual notice" that this regulation governed CHAMPUS payments. *Ibid.* Since the agreements plainly exceeded the agency's regulatory authority, the court of appeals ruled that the MOUS were "void *ab initio*." *Ibid.* The court of appeals remanded the case with instructions to dismiss for failure to state a claim. *Ibid.*

Dissatisfied with the court of appeals' decision, petitioner sought rehearing. Petitioner conceded that any contract requiring reimbursement at rates above the lowest of the three charges contained in the applicable regulation "would be void and illegal." Pet. for Reh'g 4. Nonetheless, petitioner argued that the validity of the MOUs turned on "how much was paid, how was it paid, what was the contractual intent." *Id.* at 6. At the request of the court of appeals, the government responded to the petition for rehearing, explaining that since, as the court of appeals had concluded, the MOUs were void *ab initio* as beyond the power of the government representative, petitioner's argument concerning the implementation of the agreements was irrelevant. Resp. to Pet. for Reh'g 4-5. The court of appeals denied the petition for rehearing.

ARGUMENT

This case does not warrant further review. It presents no important unresolved issue of law and does not conflict with any decision of this Court or any other court of appeals. Although petitioner acknowledges (Pet. 6) that, under this Court's ruling in *Singleton* v. *Wulff*, 428 U.S. 106, 120-121 (1976), the courts of appeals have discretion to consider and resolve an issue for the first time on appeal, petitioner

makes several arguments that such discretion was abused in this case. All lack merit.

First, petitioner suggests (Pet. 6) that the court of appeals did "not hear[] any argument on the decisive issue," that is, whether the terms of the contracts conflicted with the applicable regulation. In fact, as discussed above, petitioner filed a rehearing petition setting forth its position on this issue, and the government responded at the court's request. Thus, contrary to petitioner's claim, the court of appeals had an opportunity to consider the legal arguments of both parties before reaching its final decision to deny rehearing.

Second, petitioner asserts (Pet. 6-7) that whether the MOUs conflicted with the regulation is an issue requiring further factual development. Having found the agreements void *ab initio*, the court of appeals correctly remanded the case with instructions to dismiss. Since there was no dispute regarding the wording of the agreements or the applicability of the regulation, no additional fact finding could have any bearing on the purely legal issue whether the MOUs complied with the terms of the regulation.

Finally, petitioner alleges (Pet. 7) that the court of appeals' decision conflicts with the decisions of several other courts of appeals. However, the decisions relied on by petitioner stand for the unexceptionable proposition that when a court of appeals' decision involves new issues or legal theories, the parties should be permitted to develop "facts relevant to the decision." *Heirs of Fruge* v. *Blood Services*, 506 F.2d 841, 844 n.2 (5th Cir. 1975); see *Arlinghaus* v. *Ritenour*, 622 F.2d 629, 638 (2d Cir.), cert. denied, 449 U.S. 1013 (1980); *Box* v. *A&P Tea Co.*, 772 F.2d 1372, 1376 (7th Cir. 1985), cert. denied 478 U.S. 1010 (1986);

Charbonnages de France v. *Smith*, 597 F.2d 406, 416 n.9 (4th Cir. 1979). Where, as here, there are no relevant facts to develop, remanding the case, as petitioner suggests, would be both pointless and wasteful.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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